SUMMARY OF COOPERATIVE CASES

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

ANTITRUST; CONSPIRACY; SCOPE OF COOPERATIVE IMMUNITY

(Sunkist Growers, Inc., v. Winckler & Smith Citrus Products Co., U.S. , S. Ct. , 30 L.W. 4394, decided May 28, 1962)

Three cooperatives, owned by the same group of citrus growers and devoted to the purpose of marketing their fruit in fresh and processed form, are exempt from the conspiracy provisions of the antitrust laws with respect to their interorganizational dealings, the U. S. Supreme Court held in this case. The court said this immunity is conferred by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

The Court's basic reasoning was that, under the farmer-cooperative immunity provisions in Section 6 of the Clayton Act and in the Capper-Volstead Act, the citrus growers involved in this case could have formed a single organization to handle collectively all the processing and marketing of their fruit. All that actually happened, as pointed out in the opinion, is that the farmers formed, in addition to their one area-wide parent organization, a number of separate organizations to handle specific functions. For the purpose of applying the antitrust exemption granted farmer cooperatives, Justice Clark in the opinion treats the three separate legal entities in this case as a single "organization" or "association."

The Court closes its opinion with this word of caution: "Suffice it to say that our decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups . . . . and for monopolization . . . ." The Court cites the 1939 Borden Co. case and the 1960 Maryland and Virginia Milk Producers Association case as the basis for the quoted words of caution. Although the decision is distinctly helpful to those cooperatives which perform their functions in multi-corporate groups, the decision does not hold that a farmers' cooperative is in any way protected if it conspires with one or more non-cooperatives. The decision does not deal with the antitrust effects of a conspiracy between two or more cooperatives with unrelated owners.

This case started as a treble damage suit by Winckler & Smith Citrus Products Company under section 4 of the Clayton Act

(15 U.S.C. 15). Winckler & Smith charged Sunkist Growers, Inc., and The Exchange Orange Products Company with conspiracy to restrain and monopolize interstate trade and commerce in citrus fruits and by-products and with actual monopolization thereof in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). The defendants were each agricultural cooperatives, Exchange Orange being a wholly-owned subsidiary of Sunkist.

On this petition to the Supreme Court, defendants contended that the case in the district court was submitted under instructions permitting the jury to find an illegal conspiracy among them and Exchange Lemon Products Company, a cooperative processing association owned and operated exclusively by a number of lemon grower associations all of which are also members of Sunkist Growers, Inc. They argued that under the exemptions from the antitrust laws granted agricultural associations by section 6 of the Clayton Act (15 U.S.C. 17) and section 1 of the Capper-Volstead Act (7 U.S.C. 291), Sunkist, Exchange Orange, and Exchange Lemon, being made up of the same growers and associations, cannot be charged with conspiracy among themselves.

The trial court had overruled this contention, among others, and the jury returned a verdict of $500,000. Judgment for treble this amount and attorney fees, less some minor offsets, was entered. The Court of Appeals, accepting defendants views of the instructions, nevertheless held that the exemption claimed did not apply to this factual situation and affirmed the judgment as to the liability but reversed as to the amount of damages (284 F. 2d 1; Summary, Legal Series No. 17, p. 1).

The Supreme Court granted certiorari "limited to the issue of the immunity of interorganization dealings among the three cooperatives from the conspiracy provisions of the antitrust laws."

The Supreme Court, in reversing the Court of Appeals and remanding the case to the District Court, held that: "There can be no doubt that under these statutes [i.e., the Capper-Volstead Act and § 6 of the Clayton Act] the 12,000 California-Arizona citrus growers ultimately involved [in this action] could join together into one organization for the collective processing and marketing of their fruit and fruit products without the business decisions of their officers being held combinations or conspiracies. * * * Instead of a single cooperative, these growers through local associations first formed one area-wide organization (Sunkist) for marketing

purposes. When it was decided to perform research and processing on a joint basis, separate organizations were formed by the interested associations for reasons outlined above. At a later date one of these (Exchange Orange) was acquired by the Sunkist organization and is presently held as a subsidiary. The other (Exchange Lemon) is still owned by the lemon-grower associations, all of whom are also member associations of Sunkist. With due respect to the contrary opinions of the Court of Appeals and District Court, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. * * * There is no indication [in the language of the statutes] that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations. That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts."

# # #

MILK MARKETING ORDERS - "COMPENSATORY PAYMENT" PROVISIONS HELD INVALID

(Lehigh Valley Cooperative Farmers, Inc., v. United States, U.S., S. Ct. , 30 L.W. 4415, decided June 4, 1962)

The Supreme Court, in a 6-1 decision, has declared invalid the "compensatory payment" provisions of the New York-New Jersey Milk Marketing Order issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C.608c). These provisions required handlers who buy milk outside the marketing area and sell it in a regulated region as fluid milk to make special compensation payments to farmers who supply the

regulated market area. The amount of payment is measured by the difference between the minimum price set by the Market Administrator for fluid milk and the minimum price for surplus milk.

In an elaborate opinion, it was concluded by the Supreme Court that the provisions for compensatory payments are invalid under § 8c(5)(G) of the Act inasmuch as that statutory section prevents "the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products." The statutory language and its legislative history, according to the opinion of the Court, make it clear that the Secretary cannot provide in a milk order for "economic trade barriers of the kind effected by the subsidies called for by this 'compensatory payment' provision."

In a dissent, Justice Black said the court "strikes down a vital element of many of the milk marketing orders set up under the 1937 (Agricultural Marketing Agreement) Act while raising clouds of confusion and uncertainty as to the validity of many others."

Justice Harlan rejected the Government's contention that the two Pennsylvania processors who brought the suit would not have had to pay the fund if they had joined the marketing pool and thus had a freedom of choice. Such freedom is illusory, Justice Harlan said, because joining the pool would have forced the firms to pay the "blend price" to all their producers wherever located and account to the producers settlement fund for all milk wherever sold. "It was coercive, and, indeed, no election at all."

In the majority opinion the court states that the Secretary is "free to establish whatever regulations" are "necessary to guarantee that farmers in a price-fixing region received the regional prices he was authorized to fix even though those regulations might limit sales by outside handlers by making them unprofitable." However, Justice Black said he did not see how any formula the Secretary might devise to protect pool members from unfair competition by outside handlers "who are by the court's decision given the advantage but not required to bear the burdens of the pool" could be held to "satisfy the exacting standards" the majority "lays down today."

# # #

TRADE REGULATION - PRICE DISCRIMINATION -

FALSE BROKERAGE BAN BARS PRICE CUTS FOR COOPERATIVE

(Central Retailer-Owner Grocers, Inc., FTC Docket No. 7121, 30 L.W. 2579, May 14, 1962)

The Federal Trade Commission has decided that the Robinson-Patman Act's false brokerage ban outlaws a grocer-owned cooperative's receipt of price concessions even if they reflect savings sellers realized by dealing with it. This decision, in the words of dissenting Commissioner Elman, may well issue the "death warrant" for a business practice designed to enable independent grocers to compete with large chain stores - the very objective of the Robinson-Patman Act.

The majority finds that the cooperative performs functions equivalent to those performed by brokers. It reasons, therefore, that section 2(c) bars the receipt of compensation for such services, since this is the same as receipt of compensation in lieu of brokerage.

The cooperative purchasing organization was wholly owned by its member grocers. According to its articles of incorporation, its stated purpose was "to provide a purchasing organization for the member retail grocers and to effect such savings by bulk purchasing and distribute such savings to the member retail grocers, on a patronage percentage basis of purchases." The cooperative contended that, since at one point in its purchasing transactions it takes theoretical title to the goods purchased, it had not acted as an intermediary, agent, or broker for its members. However, the Commission said it is obvious from the articles of incorporation, that the cooperative makes such purchases in order to secure the savings for its members. The sole reason for its operation is to act as an agent or intermediary of its members ih purchasing operations.

The cooperative further contended that the price reductions, allowances, or discounts granted it by the sellers do not constitute brokerage or amounts in lieu thereof within the meaning of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act. However, the Commission reasoned that the fact that

neither the sellers nor the cooperative has so denominated the price concessions does not preclude the inference that the payments were made in lieu of brokerage. The cooperative's buyer testified that he informed the sellers that, because of the unique way in which the cooperative did business, savings would accrue to them and that these savings should be reflected in the purchase price. He pointed out to the suppliers that the cooperative "obtained requirements for all members in advance, that the label and credit risks were controlled, an assured volume of business offered, and that they need look for payment to only one office." The reasonable inference to be drawn from the circumstances surrounding these transactions is that this constituted simply a demand for sums in lieu of brokerage irrespective of the terminology used by the cooperative and sellers in connection with these purchases.

The Commission stated: "[The cooperative's] receipt of lower prices, allowances, or discounts for services performed in its intermediary capacity are clearly in contravention of Section 2(c) of the Clayton Act, as amended, since the Act prohibits payments for services rendered by a broker who is related to the opposite party in any of the ways designated in the statute. Modern Marketing Service, Inc., et al. v. Federal Trade Commission, 149 F. 2d 970 (7th Cir.1945). * * *

"The activities of a cooperative when acting as an intermediary of its members in inducing the members to handle a supplier's products are, of course, equivalent to the functions of brokers and compensation for such service is in lieu of brokerage. Where such intermediary acts in behalf of the buyers, it is unlawful, under Section 2(c) of the Clayton Act, for it to receive compensation in lieu of brokerage. A controlled intermediary of the buyer, although a cooperative, is no more entitled to receive compensation for activities of this nature than a chain store would be entitled to receive compensation from the seller in requiring individual stores in the chain to stock a particular line of merchandise. See Carpel Frosted Foods, Inc. et al., 48 F.T.C. 581, 602 (1951)."

Commissioner Elman protested that the majority opinion "stretches Section 2(c) . . . far beyond the limits of its language." He believes this situation should be handled under sections 2(a) or 2(f), so as to permit the seller to present the exculpatory defenses that are unavailable to it in defense of charges brought under section 2(c).

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NONEXEMPT FARMERS' COOPERATIVE; PATRONAGE REBATES; PROFITS FROM NONMEMBER BUSINESS

(Smith & Wiggins Gin, Inc., 37 T. C. ______________,
No. 85, February 1, 1962)

Rebates made by the taxpayer to stockholder-members and nonmembers out of profits in excess of six percent of the par value of taxpayer's outstanding stock which were derived from ginning done for stockholders, their tenants and nonmembers, were held nondeductible to the extent that they represented profits on ginning done for stockholders' tenants and for other nonmembers.

The taxpayer was a taxable corporation having some of the features of a farmers' cooperative. It derived income from ginning of cotton and disposal of cotton and cottonseed of stockholder-members, their tenants and nonmembers.

Under its by-laws and membership and patronage agreements, an amount equal to six percent of the par value of its issued and outstanding capital stock was to be deducted from all of its profits and declared as a dividend to stockholders. The balance of the profits was to be paid to each stockholder-member in proportion to the amount of cotton and seed furnished by him, including that of his tenants. The rebate was made to the member, not to the tenant. Nonmembers were not entitled to discounts as a matter of right, but a flat sum per bale was rebated to them in order to meet competition. Both the stockholders and the nonmembers were charged the same amount for ginning and received the same amount for cottonseed.

The Commissioner assessed a deficiency for 1956 by decreasing the claimed amount of deductible rebates by the percentage attributable to ginning done for stockholders' tenants and for nonmembers. The Tax Court upheld the Commission's determination.

The Tax Court said that to the extent that the amounts paid to the stockholders consisted of profits derived from business with nonmembers they were not true patronage dividends or rebates and could not be excluded from the taxpayer's taxable income. It rejected the taxpayer's contention that its taxable income must be limited to six percent of the par value of its outstanding stock because its by-laws so provided and it had contracts with its stockholders so providing.

# # #

MONTANA INCOME TAX; RIGHT OF COOPERATIVE

TO EXCLUDE PATRONAGE REFUNDS

(State Board of Equalization v. Farmers Union Grain Terminal Association; Farmers Co-op Supply Inc.; and Associated Food Stores, Inc., Dist. Ct. of the First Judicial District, State of Montana, No. 28554, Victor H. Fall, District Judge, dated April 5, 1962)

The State Board of Equalization, acting under Chapters 155 and 235 of the 1961 Session Laws, State of Montana, sought to require cooperatives to include as a part of their gross income patronage refunds allocated to patrons. The State District Court held, however, that these refunds were excludible from the cooperative's gross income.

The court said in part: "The above entitled action was brought for the purpose of securing an adjudication of the question of whether patronage dividends paid by cooperatives are deductible as an item of gross income in tax returns to the State of Montana. The question hinges upon an interpretation of the amendments contained in Chapters 155 and 235 of the 1961 Session Laws. Prior to these enactments, Section 85-1501, RCM 1947 contained subparagraph 11 which specifically exempts cooperatives from the requirement of filing a return based upon their gross income. Chapter 155 mentioned herein does not contain such an exemption so that the implication would necessarily follow that it was the intention of the Legislature that cooperatives would be subject to such taxation. However, Section 85-1504, RCM 1947 which provides for the computation of the tax was amended by the same Legislative Assembly in Chapter 235 to read as follows:

> 'The term gross income means the income from all sources within the State of Montana recognized in the determination of the corporation's Federal income tax liability.'

"This immediately poses the question as to what the Federal income tax liability is with reference to patronage dividends. Neither plaintiff nor defendant argues before this Court that the Federal Government does not exclude such items from gross income and, in fact, this is admitted. Under the circumstances present

here it appears that while the Legislature on one hand took something away, it immediately gave it back with the other.

"Taxing statutes are construed strictly as to the liability and courts are not concerned with the wisdom or desirability of the taxing or non-taxing of any facet of our body politic or economic structures. It appears to this Court that if it was the wish of the Legislature to tax patronage dividends of cooperatives it would have been a relatively simple matter to have said so in just so many words."

# # #

TAXATION: MUNICIPAL AND SCHOOL DISTRICT MERCANTILE TAXES IN PENNSYLVANIA; COOPERATIVE AGRICULTURAL CORPORATIONS DEALING EXCLUSIVELY IN LIVESTOCK NOT SUBJECT.

(Eastern Order Buying Company Appeals - 26 D & C 2d. 193 (Pa. April, 1962))

In the first case involving the construction of the Agricultural Association Corporate Net Income Tax Act of May 23, 1945, P.L. 893, Judge Guffey of the Court of Common Pleas of Allegheny County, Pennsylvania, has held that cooperative agricultural corporations dealing exclusively in livestock are not subject to the municipal and school district mercantile taxes imposed on persons dealing in "goods, wears, or merchandise" basing the decision in part on the exclusive tax provisions of the cited Act.

The court assigned three reasons: (a) such language is not sufficiently broad to cover livestock, (b) such corporations are subject to the Pennsylvania Cooperative Agricultural Association Net Income Tax Act of May 23, 1945, P. L. 893, which exempts such organizations from payment of any State or local tax other than on

real estate, and (c) the cooperatives are dealing as agents of the farmers in the selling of the products of their own growth, which transactions are exempt under the enabling acts of June 25, 1947, P.L. 1145, and June 20, 1947, P.L. 745.

Eastern Order Buying Company and Eastern Order Buyers, Inc., the two appellants in these cases are organized as cooperative agricultural corporations under the laws of the State of Ohio, having their principal place of business at Herrs Island, Pittsburgh, Allegheny County, Pennsylvania. Appellants are qualified to do business in Pennsylvania as cooperative agricultural corporations under the Act of April 30, 1929, P.L. 885, sec. 25, 14 PS § 105, having complied with the legal requirements applicable to foreign corporations doing business in Pennsylvania.

The taxing units are the City of Pittsburgh and the School District of the City of Pittsburgh, both of which were legally authorized to impose taxes and which had taken proper legal action to impose a mercantile tax "upon every person engaging in the occupation or business, inter alia, of vendor or dealer in goods, wares or merchandise" within the City.

For a better understanding of this case, certain other facts are detailed as follows:

All of the capital stock of Eastern Order Buying Company is owned by Producers Livestock Association, a corporation having its principal office in Columbus, Ohio. All of the capital stock of Eastern Order Buyers, Inc., is owned equally by Producers Livestock Association, the Ohio corporation above, and Producers Marketing Association, Inc., a corporation having its principal office in Indianapolis, Indiana. The control of the subsidiary cooperative associations by their parent associations is provided for by their respective by-laws and in conformity with the laws regulating such enterprises. Both Producers Livestock Association and Producers Marketing Association, Inc., are nonprofit cooperative agricultural associations, with membership limited to producers of livestock and cooperative marketing associations. The two appellants are instrumentalities through which Producers Livestock Association and Producers Marketing Association market livestock of their members. The two producers associations handle the marketing of cattle and hogs which can be done directly and immediately by them. However,

where for a number of reasons, a delay in the marketing for a period of days or when shipment of the livestock to a distant point is required to a market where a sale was solicited, the United States Department of Agriculture, under the Packers and Stockyard Act, prohibits the producers association from doing its own marketing to avoid possibilities of unfair competition and price manipulation. Appellant associations were, therefore, created to permit extension of marketing facilities and to protect the member producers from the vagaries of a limited local market.

Under the Co-operative Agricultural Association Corporate Net Income Tax Act of May 23, 1945, P.L. 893, 72 PS § 3420-21, appellants' annual excise tax of four percent of each dollar of the net income of the associations is collected in lieu of any other excise tax.

After detailing the foregoing facts, the Court considered a number of Pennsylvania decisions on the meaning of "goods, wares, and merchandise," and reached the first of its three conclusions, namely that "livestock" is not covered by these terms.

On the second point at issue, it also concluded that the appellants were exempt from the tax because they are cooperative agricultural associations subject only to the Pennsylvania Agricultural Cooperative Association Net Income Tax Act. The court said, in part, on this issue:

"The act mentioned above is the Act of May 23, 1945, P.L. 893, 72 PS § 3420-21. The title of this act reads: 'An Act to provide revenue for State purposes by imposing an excise tax on the net income of cooperative agricultural associations having capital stock, in lieu of all other taxes, except tax on real estate;'. . . (Underscoring supplied.)

"The title is part of a statute or ordinance and, as such, must be considered in construing the enactment: Sterling v. Philadelphia, 378 Pa. 538 (1954), 106 A. 2d 793; City Stores Co. v. Philadelphia, 376 Pa. 482 (1954) 103 A. 2d 664. From the title of this Act, it is obvious that cooperative associations were exempted from any state or local tax other than real estate tax.

" The text or body of the Act comports with the intent expressed in the title as follows:

'Section 3. Imposition of Tax - Every association shall be subject to, and shall pay for the privilege of doing business in

this commonwealth, or having capital or property employed or used in the Commonwealth, by, or in the name of itself, or any other person, partnership or association, a State excise tax at the rate of four percentum (4) per annum upon each dollar of the net income, which tax shall be collected in lieu of any other excise tax. . . . The property shall be free from any county tax excepting tax on real estate.' (Underscoring supplied.)

"The body of the act is more specific than the title in that it designates the tax to be paid as an excise tax and applies the exemption to any other excise tax, but it is no less clear that the legislature intended to limit the tax on cooperative associations to this tax. The reason for this exemption is clear as the farmer and agricultural producer has always been favored in our taxing policies out of the need to insure unfettered development of agriculture and the sensitive position of the farmer in our economy, Indeed, these policies are to some extent responsible for our abundant provisions while the governments of other nations request their citizens to do without or to eat horsemeat. We cannot agree with appellees that the subsequent enactments of the tax anything act invalidated or repealed the Act of 1945."

The court, citing well recognized principles of statutory construction, concluded that the very specific exemption in the 1945 Act must be read in harmony with the latter enabling general Acts, so as to give them both effect. In doing so, it concluded that the 4% tax must be held in lieu of "any other excise tax."

The court turned to the third point as follows:

"The third and probably the most decisive aspect of this case is the status of plaintiffs in relation to the livestock producers with whom they deal. Both the Act of June 25, 1947, P.L. 1145, 53 PS §6851, which empowers the City of Pittsburgh to levy its mercantile tax, and the Act of June 30, 1947, P.L. 745, 24 PS § 582.1, which authorizes the School District of the City of Pittsburgh to levy its mercantile tax, exempt articles grown or produced by the farmer. No question has been raised throughout this case that livestock is not the growth or produce of farmers.

"The issue would not have been raised, and presumably plaintiffs would not have been assessed by the taxing bodies had the sale of the livestock been handled directly by the parent corporations. . . . "

The opinion then reviews in detail the facts as to the interrelationships between Producers Livestock Association and Producers Marketing Association and these order buying companies and recites

a number of criteria pertinent to a decision as to whether to "pierce the corporate veil."

It concludes as follows:

"Relating the facts to the criteria recited above, it becomes abundantly clear that the alter ego of the two subsidiaries are the parent corporations and in actuality there are few indicia of separate existence. It is obvious that no corporate veil exists for the purpose of protecting the parent associations from the liabilities and wrongdoings of the subsidiaries. The two subsidiaries are much less the agents of the two Producers Associations than they are extensions of them. The parents incur all obligations, expenses and losses, receive all the profits, control and establish the prices, maintain most of the records and all of the bank accounts, and in every way regulate and control the subsidiaries. Under such circumstances we are of the opinion that the agency concept maybe disregarded and that the parents and their subsidiaries perform the same function and have the same relationship to the farmer either identically or jointly. Nothing in the laws of the states of incorporation, our own laws in regard to cooperative agricultural associations, or the by-laws of the association herein considered, prevent such arrangements. As these associations are dealing as agents of the farmers in the selling of the product of his own growth, which transactions are exempt by reason of the enabling acts under which the mercantile taxes were enacted, they are not subject to the mercantile tax: Jones v. Pittsburgh, 176 Pa. Superior Ct. 154 (1954); Jefferson Grocery Co. v. Pittsburgh School District, 394 Pa. 110 (1958). The Jefferson decision, supra, recognized the agency principle in the operation of cooperative marketing associations, which had been applied by the Supreme Court in Philadelphia School District v. Frankford Grocery Company, 376 Pa. 542 (1959). The law, as applied, would prevent the cooperative associations from being taxed even though the farmer's product was not tax-exempt. Since the farmers may not be taxed on products of his growth, there can be no question that the appellants here, acting as their marketing agent, could not be assessed on those products."

# # #

TAXATION - ORDINARY LOSSES - HEDGING OR SPECULATION

The North Iowa Cooperative Processing Association of Mason City, Iowa, during the summer of 1960 was assessed $207,108.59 in Federal Income Taxes. That claim has been settled recently for $3,103.35.

The main issue involved was the proposed treatment by Internal Revenue Service of all futures market transactions as being speculative. As a result, the losses sustained would have become capital losses rather than ordinary losses. Since capital losses must be claimed only as offset against capital gains within a 5-year period, the cooperative would have lost the deductibility as ordinary business losses of a substantial portion of the losses incurred on its futures market transactions in the taxable years in question.

After several conferences and the filing of a lengthy brief in behalf of the cooperative, the Internal Revenue Service changed its position and agreed to allow the futures market transactions as protective hedges against market variances on the cooperative's inventory of soy beans held for processing.

Had the Internal Revenue Service been successful in its original position, it would have disrupted the normal marketing procedures on agricultural commodities that have been practiced for many years. Hedging is not only widely practiced by farmer cooperatives marketing agricultural products on which futures markets are maintained, but is likewise used by other marketeers of such commodities as a type of insurance against price fluctuations.

# # #

TRANSPORTATION; INCORPORATED SHIPPER ASSOCIATION FOUND NOT EXEMPT AS BONA FIDE SHIPPER ASSOCIATION UNDER SECTION 402(c)(1) of Part IV Of the INTERSTATE COMMERCE COMMISSION ACT.

(FF-C-7 Atlanta Shippers Association, Inc., Atlanta Ga.
ICC, Div. 1, May 16, 1962)

The Interstate Commerce Commission has found that shipper associations which take the form of corporations do not qualify for exemption from economic regulation as bona fide shippers' associations under section 402(c)(1) of Part IV of the ICC Act, which concerns regulation of freight forwarders.

The Division said that "The essential predicate of any bona fide shippers' association is that the association, at all times and with respect to each less-than-truckload or less-than-carload shipment moving in its service, must act as agent for its lawful shipper-members in reducing the 'transportation costs to the members through savings effected in cooperation with other members who likewise employ the association as transportation agent.' In other words, the avowed purpose, and the practical result, of an association's combining freight of its members must not be to obtain any benefits for the shipper other than the lowering of the transportation costs of the members through savings effected in cooperation with other members 'who likewise employ the association agent.'

"As a consequence, in order to avoid being characterized as a 'for compensation' or for-hire freight forwarder, a group or association of shippers must affirmatively stand aloof to the lure of a public calling and may not lawfully handle nonmembers' shipments which have no connection with, nor fundamental relation to, the business of its shipper-members. Whenever the freight consolidating and distributing service performed in connection with nonmember shipments by the group or association of shippers is supplied with a purpose to profit from the effort itself as distinguished from a purpose merely to obtain for its members the benefits of carload, truckload, or other volume rates, then the operation is, in substance, a common-carrier freight forwarding service for compensation."

The division said that in addition to the agency relationship, more was required of a shippers' association if it were to fall within the considered exclusion.

After discussing the additional requirements, the division said that, in short, the operations conducted in the name of a purported shipper association, in order to come within the statutory exclusion, must be conducted by the association which at all times acted as agent for its shipper members who, as its principals, "(1) possess the exclusive right and ability to control the

operation and (2) assume, both jointly and severally, the essential risks entailed in conducting such operations."

Dwelling on the corporate issue, the division said that the basic distinction between an association and a corporation was that the latter was a distinct legal entity or person deriving its existence from a franchise granted by the governing body, while an association, a creature of contract, was its members and had no existence apart from the individuals comprising it.

Answering the question of whether or not a corporation lawfully might act as a bona fide shippers' association within the statutory framework provided by Congress in section 402(c), the division said "we think it may not."

". . . We think it is is apparent" it said, "that the corporate form of organization is basically inconsistent with, and inimical to, the kind of agency relationship, with its attendant mutuality of obligation, which must be preserved between the group or association and the member shippers."

The division said Congress intentionally avoided use of the word "corporations" in denominating those to whom the exclusionary provisions of section 402(c) would apply.

"In our treatment of this corporate issue," the division said, "the decisions in the Pacific Coast Wholesalers' case have not been overlooked.

"Although that shippers' organization was incorporated, we do not believe that those decisions have any pertinency to the issue now under consideration, for the question of whether a corporation could qualify under the exclusionary provisions of section 402(c)(1) was neither raised, nor considered in those proceedings. Accordingly, the mere circumstance that the Pacific Coast Wholesalers' Association was a corporation aids neither side in the disposition of this controversy. We realize, of course, that there are numerous so-called shippers' associations other than Pacific Coast Wholesalers now operating under the corporate form and because of our present conclusions we expect them, within a reasonable time, to take any action necessary to assume the characteristics of a bona fide shippers' association as described herein. Failure to do so will expose them to the institution of any action necessary to assure such compliance."

# # #

TRANSPORTATION; LEASING ARRANGEMENTS: "EXCLUSIVE USE AND POSSESSION"

(Interstate Commerce Commission Docket No. MC-C-3155)

When vehicles are not assigned to lessee's exclusive use and possession, but are permitted to be used by the lessor for other activities, for-hire carriage may result. This was the primary point used by the Interstate Commerce Commission in finding a lease arrangement between G & W Transfer, Hickory, North Carolina, and Calvine Mills, Inc. of North Bergen, New Jersey, to be for-hire carriage. In its opinion, the Commission says:

"By the terms of the agreement between respondents in effect at the time of hearing, Calvine is given exclusive use and possession of the leased equipment and utilizes drivers employed by it. This arrangement undertakes to present the form of an equipment rental operation which does not supply drivers. In fact, however, the vehicles involved were stationed at G & W's garage and were subject to utilization, often with drivers actually on Calvine's payroll, for movements on behalf of other shippers. The conclusion is inescapable that regardless of the terms of the lease, the vehicles involved were not assigned to Calvine's exclusive use and possession, but reverted to G & W's control for use in other activities, and that in many instances the drivers maintained an economic relationship to this purported lessor by which they are dependent upon it for employment. We are convinced here that, even if all the usual responsibilities of an employer with respect to drivers were conceded to be borne by Calvine, the real service offered by G & W, Calvine and other shippers is, in substance, for-hire motor carriage subject to regulation under Part II of the Act."

# # #

ANTITRUST -MONOPOLIES - COUNTERCLAIMS RIGHTS

(Dairy Foods, Incorporated v. Dairy Maid Products Cooperative v. Carnation Company, et al., 297 F. 2d 805 (1961))

In this case, Dairy Maid Products Cooperative (hereinafter designated as DMPC) which had been sued for patent infringment by Dairy Foods Incorporated, (hereinafter designated as DFI) counterclaimed against DFI and other counter-defendants (Carnation Company, Foremost Dairies, Inc., and Pet Milk Co.) seeking recovery of treble damages under section 4 of the Clayton Act and injunctive relief under section 16 for alleged misuse of the patent in furtherance of a conspiracy in violation of sections 1 and 2 of the Sherman Act (Antitrust Law). The lower court, on motion, dismissed this counterclaim as being insufficient in its allegations of fact to show injury to DMPC's business or property and as premature in that it stated no accrued claim. The Circuit Court of Appeals reversed on both points.

The Court held that the counterclaim was sufficient in that it alleged that conspirators required DMPC to make choice among alternatives each of which had adverse effect (economic or financial impact) on its instant milk business. It said:

> "It was allegedly compelled either to cease production with consequent loss of sales of the product, pay tribute with consequent increase in production cost, or incur the financial burden of expenses incident to the defense of litigation. Each of these alternatives had its particular adverse economic or financial effect on defendant's instant milk business. To place a person in such a situation is an injury to his business. True, it is the defendant's choice which determines the nature of the resulting damages but it is the necessity of having to choose from such alternatives that is the injury. The congressional enactments here involved were designed to afford a legal right to engage in business free from conspiratorial compulsion such as here alleged. A violation of that right is a legal injury to the business adversely affected. Section 4 of the Clayton Act by its reference to the person "injured" recognizes that it is the "injury" which gives rise to the consequent liability to respond in threefold "damages."

The court also found that the counterclaim was not premature. It said:

> "The injury to defendant's business or property occurred when plaintiff filed the infringement suit - the compulsion which forced the choice. Defendant's right of action, asserted by its counter-claim, then accrued. Emich Motors Corporation v. General Motors Corporation, 7 Cir., 229 F.2d 714. The fact that the damages sought include costs and expenses yet to accrue at the time the counterclaim was filed, as well as expenditures already made to defend the patent infringement suit, does not make the counterclaim premature. Lawlor v. Loewe, 235 U.S. 522, 536, 35 S.Ct.170, 59 L. Ed. 341. The threefold damages here claimed are not dependent or contingent upon the outcome of plaintiff's action and plaintiff's attempted analogy to a counterclaim for malicious abuse of process consisting of the bringing of the case in chief is inappropriate. The doctrine of Shwab v. Doelz, 7 Cir., 229 F. 2d 749, and similar cases, is not applicable here. A prior adjudication that claimed patent rights are unenforceable is not an element prerequisite to the maintenance of an antitrust action for damages or injunctive relief based on misuse of the patent. And there is no justification for applying a different rule merely because the antitrust action is asserted in the form of a counterclain in an infringement suit where the misuse is pleaded as an affirmative defense. . . . The defendant is not required to await a successful adjudication of the misuse defense before asserting its counterclaim. We find no merit in the contention that the counterclaim is premature and cannot be maintained because defendant has pleaded misuse of the patent, based on the alleged conspiracy and acts in furtherance thereof, as a defense to the infringement suit. The argument that the counterclaim is premature because if plaintiff prevails in its infringement suit the basis of the alleged misuse defense will have been adjudicated adversely to the defendant begs the question. And, that such misuse, if proved, would bar relief to plaintiff would not preclude defendant from recovery of damages it sustained by reason of the same conduct. Moreover, the misuse defense does not reach or afford a remedy against the claimed continued threat of injury and damage from the alleged conspiratorial activities of Carnation and Foremost. It is no bar to the injunctive relief sought."

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